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Dysert v. Florida Power Corp., 93-ERA-21 (Sec'y Aug. 7, 1995)

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DATE: August 7, 1995
CASE NO. 93-ERA-21

IN THE MATTER OF

TERRY DYSSERT,

COMPLAINANT,

v.

FLORIDA POWER CORPORATION,

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case presents important questions of interpretation of the amendments to the employee protection provision of the Energy Reorganization Act of 1974, (ERA), 42 U.S.C. § 5851 (Supp. IV 1992), by the Comprehensive Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3123. I find, for the reasons discussed below, that those amendments made only one change in the order and allocation of burdens of proof and burdens of production in hearings under the ERA. I hold that the Administrative Law Judge (ALJ) properly applied those burdens, [1] that the findings of fact are fully supported by the record and I will adopt the recommendation that this case be dismissed.

The facts are well summarized in the ALJ's Recommended Decision and Order (R. D. & O.) at pp. 3-15. Briefly, the Complainant, Terry Dysert (Dysert), worked for Respondent Florida Power Corporation (FPC) from early January to the beginning of July 1992 as a contract engineer. Dysert, as a contract engineer, was supplied by an outside firm, Energy Services Group International, Inc. (ESG), but worked under the direct supervision of FPC's managers. [2] R. D. & O. at 3. Dysert's contract with ESG provided for a term of employment at FPC of one year, Complainant's Exhibit (CX)-1, but FPC terminated his employment after six months as part of a "budget cut."

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Transcript of hearing (T.) 272. Dysert filed a complaint under the ERA alleging that he was discharged because he raised safety and quality concerns about certain electrical equipment purchased by FPC.

The ALJ held that the ERA protected Dysert, a contract

worker, from retaliation by FPC for protected activity and that Dysert filed a timely complaint under the Act. See footnotes 1 and 2. The ALJ also found that Dysert engaged in protected activity when he raised questions about certain equipment purchased from an outside supplier, R. D. & O. at 21, and that FPC took adverse action against him when it laid him off six months before his contract was to expire. *Id.* at 23. But, the ALJ found that "no retaliation was involved in complainant's termination." R. D. & O. at 24. Thus, Dysert did not carry his burden of proof to show that the adverse action was causally related to his protected activity.

Complainant argues that the ALJ did not properly allocate the burdens of proof, asserting that the 1992 ERA amendments significantly altered the burdens of the parties. Complainant also challenges the ALJ's conclusion that "there was no causal relationship between" Complainant's protected activity and his lay off, and he asserts that Respondent did not meet the new, higher burden of proof placed on employers in dual motive cases under the 1992 amendments.

Congress amended the ERA in 1992 by adding a new paragraph (3) to 42 U.S.C. § 5851(b) which provides, among other things, that "[t]he Secretary may determine that a violation . . . has occurred only if the complainant has demonstrated that [protected activity] was a contributing factor in the unfavorable personnel action alleged" 42 U.S.C. § 5851(b)(3)(C). If the Complainant carries that burden, he nevertheless is not entitled to relief "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." 42 U.S.C. § 5851(b)(3)(D).

Dysert argues that the 1992 amendments significantly eased the burden placed on a complainant in an ERA case, requiring him only to establish a *prima facie* case of discrimination. Dysert contends that after the comparatively light[3] burden of establishing a *prima facie* case is met, he has proved discrimination and "the 'burden then shifts to the employer to show by *clear and convincing evidence* that it would have [sic] the same unfavorable personnel action in the absence of such behavior.' 42 U.S.C. § 5851(b)(3)(D)" Complainant's Brief in Opposition to the ALJ's Recommended Decision and Order at 10. (Emphasis added by Complainant.) [4]

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A "familiar canon of statutory construction [is] that the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Rafieh-Rafie Ardestani v. INS*, 502 U.S. 129, 134 (1991). There is "no more persuasive evidence of the purpose of a statute than the words by which [Congress] undertook to give expression to its wishes." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, (1982) (quoted citation omitted). In addition, the Supreme Court has held that if a term is not defined in a statute it should be given its common law or ordinary meaning.

Community for Creative Nonviolence v. Reid, 490 U.S. 730, 739, (1989).

The language added to the ERA in 1992 permits the Secretary to find a violation "only if the complainant has demonstrated" that protected activity contributed to the employer's adverse action. The ordinary meaning of the word "demonstrate," which is not defined in the statute, is "to prove or make evident by reasoning or adducing evidence." The American Heritage Dictionary, Second College Edition, 1982. Significantly, the new statutory language does not authorize finding a violation if the complainant demonstrates a *prima facie* case of retaliation. In contrast, other paragraphs of the same section explicitly provide for different degrees of evidentiary burden applicable at certain stages of processing an ERA complaint. Subsection 5851(b)(3)(A) provides that the Secretary may not conduct an investigation "unless the complainant *has made a prima facie showing*" that retaliation was a motivating factor in the adverse action (emphasis added), and subsection (D) directs the Secretary not to order relief for the complainant "if the employer demonstrates *by clear and convincing evidence* that it would have taken the same unfavorable personnel action in the absence of" protected conduct. (Emphasis added.) It is an accepted rule of evidence that "[g]enerally, the party with the burden of persuasion must establish the elements of its case by 'a preponderance of the evidence.' Occasionally, constitutional or policy considerations impose a greater burden; in such instances a party will be required to prove its case 'by clear and convincing evidence'" Jones on Evidence, 7th Ed. 1992, § 3.8.[5] The language and structure of the statute show that Congress did not intend to alter the "degree of persuasiveness" *id.*, by which a complainant must prove his case.

Complainant cites some comments by members of Congress as support for his interpretation of section 5851(b)(3)(C). For example, discussing changes made by the conference committee, Rep. Ford explained that under this new section "[o]nce the complainant makes a *prima facie* showing that protected activity contributed to the unfavorable personnel action . . . a violation

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is established unless the employer establishes by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." 138 Cong. Rec. H 11444 (daily ed. Oct. 5, 1992). See also 138 Cong. Rec. H 11409 (daily ed. Oct. 5, 1992) (statement of Rep. Miller). But these statements are at odds with the language of the statute which requires the complainant to "demonstrate" that protected activity contributed to the adverse action, not merely to make a *prima facie* showing of causation. The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).[6] Where there is a conflict between the text of a statute and statements by some legislators, the Supreme

Court has held "[w]here [the statute] contains a phrase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 98-99 (1991). I find the ALJ correctly applied the burdens of proof and burdens of production of evidence in this case.

The record in this case has been reviewed and it fully supports the ALJ's findings of fact and conclusion that Dysert's protected activity was not a motivating factor in FPC's decision to lay him off. I adopt the ALJ's recommendation and the complaint in this case is DISMISSED.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The ALJ also found that the new 180 day time limit for filing complaints of retaliation applies to cases, such as this, where the alleged adverse action took place before the act was amended, but within 180 days of the date of the complaint that was filed after the effective date of the amendments. Assuming the complaint was timely, however, I need not address this question of the retroactivity of the new time limit because I agree with the ALJ's conclusion that this case should be dismissed on the merits.

[2] I agree with the ALJ that the ERA protected Dysert from retaliation by FPC whether he was an employee of ESG or FPC. See *Hill v. TVA*, Case Nos. 87-ERA- 23 & 24, Sec.. Dec. May 24, 1989, slip op. at 2-10.

[3] "The burden of establishing a *prima facie* case of . . . discrimination is not an onerous one. The plaintiff need only show that he was discharged under circumstances which give rise to an inference of unlawful discrimination." *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1980).

[4] Complainant's brief did not accurately quote the statute. The language of subsection (D) is accurately quoted in the preceding paragraph in the text.

[5] The definition of "demonstrate" in Black's Law Dictionary suggests that the term in legal usage may connote a higher degree of persuasiveness: "to prove indubitably." Black's Law Dictionary, Fifth Ed. 1979.

[6] In other areas as well, Congress uses explicit language when it applies the *prima facie* standard of proof. See, e.g., 8 U.S.C. § 1451(Immigration and Naturalization Service proceedings on revocation of

naturalization); 15 U.S.C. § 13 (Federal Trade Commission prosecution of price discrimination under anti-trust laws); 20 U.S.C. § 1234a (Department of Education fund recovery proceedings).